

No. [Enter Case No. and Press Close]

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 18, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3033-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY K. SCOTT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County:
VIVI L. DILWEG, Judge. *Affirmed.*

LaROCQUE, J. Gregory K. Scott appeals a misdemeanor conviction for a violation of § 945.02(3), STATS., which prohibits possession of facilities to conduct a lottery, with intent to conduct a lottery. Pursuant to a plea bargain, the State reduced the initial charges of four felony counts of dealing in gambling devices in violation of § 945.05(1)(b), Stats., to the misdemeanor

offense and Scott pleaded no contest. The circuit court withheld sentence and placed Scott on probation for nine months. This court agrees with the State's contention that Scott has inadequately briefed many issues he seeks to raise and has waived various defenses asserted on appeal by virtue of his no contest plea. Finally, with respect to Scott's claim that there is no factual basis to support the charge, he has failed to seek to withdraw his plea in the trial court. The judgment is therefore affirmed.

The essence of Scott's contentions are as follows: Slot machines can be possessed for sale to legal entities and jurisdictions, in this case Indian tribal casinos; federal law preempts the State criminal gambling statute; the doctrine of res judicata bars this prosecution; he had permission to possess the gambling devices from the Wisconsin Gaming Commission; he relied upon advice of various federal officials' legal opinions to conduct his business; the statute of which he stands convicted is unconstitutional; and the facts do not support the charge.

Scott also requests for the first time in his reply brief that certain materials, now attached as an appendix to the brief, and allegedly relied upon by the circuit court in resolving certain issues, be included in the record for purposes of appeal. This request is contrary to the Rules of Appellate procedure, in particular, RULE 809.15, STATS. Further, there is no support in the record for Scott's contention that the materials "may have been inadvertently placed in the record of the companion case or otherwise misplaced" The request to supplement the record is denied.

In support of the State's contention that Scott's appellate brief fails to meet even minimal standards, it also notes that the record reflects that Scott practiced law for ten years. He agreed to a consensual revocation of his license in 1986. *In re Scott*, 132 Wis.2d 222, 390 N.W.2d 572 (1986). Many of Scott's arguments are undeveloped or improperly explained, are unsupported by citation to authority and include no references to the record. See RULE 809.19(1)(d), STATS. The State's reference to *State v. Pettit*, 171 Wis. 2d 627, 492 N.W. 2d 633 (Ct. App. 1992), is appropriate:

We sometimes (perhaps too often) make allowances for appellate counsel's failure to abide by these rules. However, the Court of Appeals of Wisconsin is a fast paced, high-volume court. There are limits beyond which we cannot go in overlooking these kinds of failings. Pettit's brief is so lacking in organization and substance that for us to decide his issues, we would first have to develop them. We cannot serve as both advocate and judge. In light of Pettit's inadequate briefing of these remaining issues, we decline to address them. *See* Rule 809.83(2), Stats.

Id. at 647, 492 N.W.2d at 646-47 (footnote omitted).

Next, the general guilty plea waiver rule applies to many issues raised on appeal in this case, including constitutional issues. *See State v. Nelson*, 108 Wis.2d 698, 701, 324 N.W.2d 292, 294 (Ct. App. 1982) (a guilty plea, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses).

Next, Scott contends that there is no factual basis to support the crime to which he entered his no contest plea. This court concludes that Scott's failure to seek a plea withdrawal bars him from asserting this contention on appeal. At the time of his plea, Scott was asked by the circuit court whether the court could use the facts in the complaint and the preliminary hearing as a factual basis for the plea, to which Scott answered in the affirmative. Whether grounds exist to withdraw a plea cannot be reviewed on appeal absent a postconviction motion in the trial court. *Id.* at 701-02, 324 N.W.2d at 294. In his reply brief, Scott suggests that he meant to suggest in his brief-in-chief that he was raising a question of law, that is, whether slot machines are lottery devices. He says they are not, but cites no authority in support. The record includes a letter from the assistant attorney general, acting as special prosecutor for Brown County, proposing the plea bargain that Scott accepted. The letter advised Scott that "When the Wisconsin criminal code was drafted, it was made clear that a gambling machine is a facility for conducting a lottery." The letter quoted from

5 Wis. Leg. Council, Judiciary Committee, Report on the Crim. Code, cmt. to § 345.01 at 153 (1953): "Although a person who plays a gambling machine undoubtedly makes a bet or participates in a lottery, he usually does not think of his conduct in those terms" Absent any authority to the contrary from Scott, the law considers slot machines lottery devices.

For the preceding reasons, the conviction for a misdemeanor gambling violation is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.